

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
SUNHONG YIM, et al., :  
: 14-CV-5883 (WFK)  
Plaintiffs, :  
:  
v. :  
: 225 Cadman Plaza East  
CAREY LIMOUSINE NY, INC., et al., : Brooklyn, New York  
:  
Defendants. : November 20, 2015  
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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING  
BEFORE THE HONORABLE JAMES ORENSTEIN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings began at 11:31 a.m.)

2 THE CLERK: Civil Cause for [inaudible], Yim v. Carey  
3 Limousine NY, Inc., et al., Docket No. 14-CV-5883.

4 Counsel, please state your name for the record  
5 starting with the plaintiff.

6 MR. SCHWARTZ: Good morning, Your Honor. Brian  
7 Schwartz for plaintiffs Acuna, Olarte and the punitive class.

8 THE COURT: Good morning.

9 MR. RAND: Good morning, Your Honor. William Rand  
10 for plaintiff Sunhong Yim.

11 THE COURT: Good morning.

12 MS. ESTEVEZ: Anne-Marie Estevez and Sharon Lisitzky  
13 on behalf of Carey.

14 THE COURT: Good morning. All right, folks. So  
15 we've got the motion for preliminary approval. I've read all  
16 the papers you submitted. So feel free to assume that I'm  
17 familiar with those arguments and that you don't need to  
18 restate them.

19 I'm happy to hear from all of you for or against the  
20 motion. I think what would be most useful for me to is to  
21 start with you, Mr. Rand, because you're objecting to it and  
22 I'll tell you that from my review of the -- of the submissions  
23 so far my initial take -- I want you to know where I'm  
24 starting from -- is that the proposed class action settlement  
25 is within the realm of what can be approved and that

1 preliminary approval is therefore appropriate. So I want to  
2 give you a chance to be heard in opposition to it because I  
3 think everyone else is for the position that I think is the  
4 right one.

5 In doing that I want to make sure I understand your  
6 opposition. As I read your papers it's essentially your  
7 client saying full recovery for me would be much greater than  
8 I get under the proposed settlement and therefore it's not a  
9 fair one and it's not fair for me or the other members of the  
10 class. Is that essentially it?

11 MR. RAND: Not full recovery. Any reasonable  
12 discount on recovery. He's only getting \$5,000. If you look  
13 at the papers -- I want to see the underlying facts to see  
14 what the merits of this action are but he may have a claim for  
15 \$200,000. So why would he settle for \$5,000.

16 THE COURT: It's not just what his claim is, right,  
17 it's a proposed class action, is this in the interest of the  
18 class.

19 MR. RAND: But he's typical.

20 THE COURT: Well, first of all, does he have a  
21 contract that has an arbitration clause?

22 MR. RAND: Yes.

23 THE COURT: One of the things that's been said in  
24 support of the motion is that many, if not most of the members  
25 of the class do and that that's an impediment to them

1 prevailing here, it's an impediment to class certification.

2 What do you say to that?

3 MR. RAND: That there's not that many of them,  
4 there's over 100 people that do not have an arbitration  
5 agreement.

6 THE COURT: How many of them do?

7 MR. RAND: Huh?

8 THE COURT: And how many do?

9 MR. RAND: I don't know. I think it's 135. Well,  
10 there's plenty of people that have a class. It's large enough  
11 to have a class of people without an arbitration agreement.

12 THE COURT: All right.

13 MR. RAND: And there's no reason that the people who  
14 are in this class should have their claim diluted by people  
15 who may have a less great claim that happened without an  
16 arbitration agreement. So I would say those people are not  
17 typical class members.

18 THE COURT: I see. And what do you say about the  
19 recent case law -- I guess two strands of cases. Forgive me  
20 for blanking on their names but one that's approved  
21 settlements with comparably low percentages of recovery  
22 compared to punitive full recovery and the other about cases  
23 weighing in on the independent contractor relationship in this  
24 industry. It seems to me that there are some significant  
25 risks to proceeding that your position just doesn't address.

1 MR. RAND: I don't think they're independent  
2 contractors because they only work for one employer. They  
3 work 72 hours a week is the allegation. They don't work for  
4 anybody else. They're told when to work, how to work and what  
5 to do.

6 THE COURT: And you think this is going to be  
7 uniform --

8 MR. RAND: I think there's a very low chance of  
9 losing on that claim.

10 THE COURT: You think there's a very low chance but  
11 there are cases that go the other way, aren't there?

12 MR. RAND: Well, I mean the FedEx cases but those are  
13 different facts and some of them go our way and some don't.  
14 So yes, I agree there may be some risk there but not enough to  
15 settle for almost nothing.

16 THE COURT: I see. Okay. Anything else you want to  
17 say?

18 MR. RAND: Yes. I have a number of --

19 THE COURT: Go ahead.

20 MR. RAND: In terms of the actual notice, I would  
21 request that it include that Mr. [inaudible] made an objection  
22 [inaudible] his attorney. I would like to request that I can  
23 send a notice out to all the people regarding this preliminary  
24 approved settlement so I can give my views to the class so  
25 they know there's some other viewpoint.

1           Also, I haven't been able to --

2           THE COURT: Have you submitted -- forgive me if I  
3 missed it. Have you submitted what -- a notice that had  
4 proposed sent out?

5           MR. RAND: No, because I was waiting -- this is all  
6 happening very fast for me. I was only just hired at the end  
7 of last week by my client.

8           THE COURT: I understand it's fast for you but it's  
9 not fast for your client. Why he's waited until the last  
10 moment to secure counsel I don't know but -- and I understand  
11 it happens sometimes that counsel find themselves retained at  
12 the last moment by the client who's waited way too long to get  
13 counsel involved in the process but we've already waited for  
14 your client to bring new counsel in. So I'm not going to wait  
15 further.

16           MR. RAND: Well --

17           THE COURT: If there's really no reason to -- there's  
18 nothing to stop you in submitting your papers.

19           MR. RAND: This is a very -- nowhere in the papers --

20           THE COURT: Excuse me. I wasn't finished speaking.

21           MR. RAND: Right.

22           THE COURT: There wasn't anything to stop you in  
23 submitting your papers from saying here's what I'd like the  
24 notice to say. Has there been?

25           MR. RAND: I didn't have very much time. I didn't

1 know what the position of the Court would be and you  
2 haven't --

3 THE COURT: Because you didn't ask.

4 MR. RAND: You haven't even preliminarily approved  
5 the notice. I can ask for a second notice later. There's no  
6 rush on that, right?

7 THE COURT: I know but if you're saying this is  
8 something you want me to consider, you knew that a proposed  
9 notice was before me. There was nothing stopping you from  
10 doing it. If you had an uncertainty you certainly could ask  
11 but in any event you don't have a notice before me and if you  
12 want something later obviously that can be asked for.

13 MR. RAND: I'm asking right now. The notice would  
14 say what I said in my papers.

15 THE COURT: Okay.

16 MR. RAND: And it would say you can contact me.

17 THE COURT: Well, I'm certainly not going to weigh in  
18 on that without seeing a proposed --

19 MR. RAND: And I will submit a proposed notice on a  
20 very quick basis if you would like it very quickly or you can  
21 give me a reasonable time. Whatever time frame is good for  
22 you.

23 The other thing is the Court has a duty to make sure  
24 that this recovery reflects the merits of the action. I've  
25 just joined this action and if you're not going to allow me to

1 delay the process on the preliminary approval I still need to  
2 look at all the documents so I can comment on the final  
3 approval. Some of the documents were filed under seal in the  
4 settlement. So I haven't been able to see what the  
5 independent contractor agreements are. So I would ask that  
6 counsel will agree to provide those to me.

7           Also, I would like to be provided with all the  
8 discovery in this case, all of which is electronic so it  
9 shouldn't be hard to produce to me. I think there was one  
10 deposition, a deposition transcript so that I can make an  
11 intelligent argument to the Court as to what is fair or not  
12 fair once I've looked at all these documents.

13           THE COURT: Does anyone wish to be heard?

14           MR. RAND: I have more, Your Honor. I'm not  
15 finished.

16           THE COURT: I'm sorry.

17           MR. RAND: I would also request a short period to put  
18 in a formal brief in opposition to preliminary approval. I  
19 can get that done by Wednesday before Thanksgiving.

20           THE COURT: Well, I've already given you an  
21 opportunity. I'm not going to wait further. And you've  
22 submitted the declaration.

23           MR. RAND: Just deny my request, that's fine. I made  
24 it on the record. That's fine. And then I'll have a record.

25           THE COURT: If you'd like to tell me what I should

1 say in making a ruling you can but I'm going to say what I  
2 think is appropriate.

3 MR. RAND: Okay.

4 THE COURT: Mr. Rand, you have had time. Your client  
5 has had even more time to secure counsel who would speak for  
6 him. But in the time that you've had you have submitted  
7 something that reflects your views and you haven't given me  
8 reason to think that you could submit a declaration but not a  
9 brief. So the request for more time before I make a  
10 recommendation that's denied.

11 MR. RAND: Okay. One of the arguments is that if you  
12 have a class everybody has to be treated similarly in a  
13 settlement. You can't say some people get \$10 million and  
14 other people get \$1.00. Right? That would not be a fair  
15 settlement.

16 Here, they're basically saying if you sign the  
17 operating agreement you get twice as much money as if you  
18 don't sign the operating agreement. That's not a reasonable  
19 class action settlement and that's not fair under the law, and  
20 if you gave me time I could provide a lot of law that will  
21 show that and I will.

22 THE COURT: You keep saying if I give you time. You  
23 can say it as many times as you like but it won't change the  
24 reality that I have given you and your client time. We're at  
25 a stage in the proceeding where I'm going to make a

1 recommendation but --

2 MR. RAND: I can make the briefs to the judge, you're  
3 right. I have three more days.

4 THE COURT: -- you have had time.

5 MR. RAND: So that's fine.

6 THE COURT: I'm sorry. What was the last -- I didn't  
7 hear.

8 MR. RAND: Because if you make a recommendation then  
9 I can appeal the recommendation to the judge; correct?

10 THE COURT: Right. But not based on arguments that  
11 you haven't made at this stage.

12 MR. RAND: Yes, but the legal arguments are --  
13 factual arguments -- I mean it's just providing case law to  
14 the Court for the arguments that I've already made. That's  
15 what I was requesting.

16 THE COURT: Okay. There's been nothing to stop you  
17 from submitting case law prior to now. I just don't want you  
18 to have any misimpressions about the level of review. It is  
19 de novo as to legal determinations but what's not permitted  
20 typically is making legal arguments that haven't previously  
21 been made in advance of the recommendation.

22 MR. RAND: I think that's about all I have at this  
23 point.

24 THE COURT: Does anyone wish to be heard in response?

25 MR. SCHWARTZ: Thank you, Your Honor. Your Honor's

1 tentative direction on this is the correct one, that at this  
2 stage of the proceedings it's not the time -- not the moment  
3 to consider objections. We had in our papers a number of  
4 cases that hold that -- for that proposition including In re:  
5 Penthouse Executive Club Compensation Litigation and others.  
6 I know you read the briefs carefully. And as you know, this  
7 is a deal that is within the range of possible approval. So  
8 it should be approved.

9           I do want to emphasize how -- because I think it's  
10 one of the most important factors in preliminary approval is  
11 the arm's length nature of the negotiations that we undertook.  
12 We literally have something on the order of 1,000 emails going  
13 back and forth negotiating every detail of this settlement and  
14 I don't want to say contentious because it sounds like we were  
15 rude to each other but there was very little we could agree on  
16 at the outset and we really had to wade through a tremendous  
17 amount of disagreement to ultimately get a deal that we were  
18 able to feel -- that I was able to feel was satisfactory to  
19 the class and that they could take to their client.

20           So it was extremely arm's length. I don't know if  
21 that makes sense, extremely arm's length, but very --

22           THE COURT: I get the --

23           MR. SCHWARTZ: Very long arms. In any event, we  
24 had -- it was very hotly debated to the point it was almost a  
25 joke with us because it was -- I don't think I've ever had so

1 much intensive negotiation over a settlement agreement and the  
2 reason is because -- and I think this is an important point.  
3 We completely redrafted their business model as far as -- at  
4 least as far as the way the contracts read four people like  
5 Mr. Yim, that now he has extensive rights that he does not  
6 have under his current agreement if he -- not just him but  
7 if -- for class members that they're going to have under the  
8 new deal, rights that are critical to day to day employment.  
9 Things like the right to work for other people, the right  
10 not -- the right to turn down jobs, the right to not be fired  
11 except for good cause, the right to sell their company if you  
12 will, their limo business to somebody else, and many others.

13           The old agreement that Mr. Yim has, and this is part  
14 of what's flawed in some of the objections at the point where  
15 Your Honor starts to consider them down the line is that his  
16 old agreement which would be the basis for his claims gives  
17 very little recourse to him. It's a very one sided agreement  
18 frankly and the new agreement -- now, Carey's position would  
19 be that they never -- that they don't enforce it, it's very  
20 individualized but notwithstanding that the document says what  
21 it says and it's -- it doesn't give him much recourse at all.  
22 Carey has unilateral right to change -- to change the  
23 structure of it, to add charges for tips, sales, taxes,  
24 service fees and we've changed that. There's going to be  
25 transparency. So it's a very meaningful benefit of the deal

1 which is why ultimately I think it's a good deal in addition  
2 to the significant monetary benefit.

3 Now, Mr. Rand, I don't know if he's unfamiliar with  
4 the independent contractor cases that are really at issue  
5 here. He mentioned some FedEx cases. Those, Your Honor, as  
6 you know are not the cases that are most on point. The cases  
7 that are on point are the Saline case which is up at the  
8 Second Circuit which will be -- oral argument will be heard in  
9 February which is a case that Carey would have a decent  
10 argument is very much like our case and in which the  
11 plaintiffs got nothing. They got zero. They lost. Summary  
12 judgment against them.

13 So that made our case at the outset extremely risky  
14 but I hoped that we would be able to distinguish that and if I  
15 had to litigate the case rather than getting a fair result of  
16 the class then I would seek to do so. But other firms did not  
17 forge ahead and the Outten & Golden firm which is frankly one  
18 of my -- some of my finest colleagues in the [inaudible] here  
19 in New York.

20 THE COURT: I didn't hear you what you said. Which  
21 firm?

22 MR. SCHWARTZ: The Outten & Golden firm.

23 THE COURT: Okay.

24 MR. SCHWARTZ: It's really an exceptional firm. They  
25 settled out the Anwar case for under a thousand bucks a person

1 based on the Saline case. They saw the writing on the wall  
2 and they decided to settle it out and I don't question them  
3 for doing so and it was approved but for a class relatively  
4 the same size as our class. They got a gross of \$360,000 and  
5 we got \$2.1 million.

6 So Mr. Yim's objections to the extent he decides  
7 ultimately to assert them after the notice goes out need to be  
8 viewed in that context but there is a very good chance that we  
9 would lose altogether.

10 THE COURT: Can I ask a question about how the  
11 agreement works. To the extent you talked about changes to  
12 Carey's practices in terms of contracting with the drivers,  
13 what becomes of existing contracts with those who opt out of  
14 the settlement if it's approved?

15 MR. SCHWARTZ: They keep them as long as Carey wants  
16 to keep them.

17 THE COURT: So they have the same contract that he  
18 complained about and they can continue obviously to --

19 MR. SCHWARTZ: Right.

20 THE COURT: -- litigate claims about them?

21 MR. SCHWARTZ: Right. And that does raise a point I  
22 wanted to make sure I addressed which is this idea that in a  
23 class action that the whole class has to be -- receives the  
24 same kind of relief or --

25 THE COURT: It's clearly not true. I don't have

1 trouble with that.

2 MR. SCHWARTZ: Okay. And ultimately when we decided  
3 on an allocation it was based on what we felt were the  
4 relative strengths of people's claims and also based on the  
5 fact that we had put into place a very significant benefit  
6 with this deal that we wanted people to take because that's  
7 what the litigation is about. If people take a bit of money  
8 but then keep the same flawed deal that they had before it  
9 doesn't really fix the problem that we filed the lawsuit  
10 about. So it helps, it gives them a little relief but I think  
11 that the underlying changes in the structure of the business  
12 are at least as if not more significant.

13 So when -- ultimately when Your Honor is evaluating  
14 the settlement it should be in that context, the total value  
15 of the settlement.

16 I certainly have a lot more I could say on a variety  
17 of points but it seems like you -- I'm happy to address  
18 anything.

19 THE COURT: Well, I want you to say anything that you  
20 think is appropriate. I just don't want you to feel compelled  
21 to just restate things that are already in the papers.

22 MR. SCHWARTZ: Yes, Your Honor, naturally.

23 THE COURT: But if there's something that's not in  
24 your papers that you think supports an argument or a response  
25 to something Mr. Rand said I want you to have an opportunity

1 to do so.

2 MR. SCHWARTZ: Yes. I mean I do want to address this  
3 idea that somehow the notice should include the objectors or  
4 objector's counsel. I have never seen that. I don't know  
5 where that's coming from. I don't know that there are any  
6 precedents for that. I certainly haven't seen any but I don't  
7 think that's appropriate at all. In fact, there's a recent  
8 case I just read in the Eastern District where an objector's  
9 counsel was chastised for trying to reach out and get people  
10 to opt out and it's just that would be inappropriate.

11 The class -- and this is why preliminary approval  
12 should happen. We should go and see what the response to the  
13 class is. That is the most important factor ultimately under  
14 the Granell factors and we'll see if others feel the way that  
15 Mr. Yim apparently feels. I suspect if others feel that  
16 they're being cheated out of I believe all in Mr. Yim's claims  
17 and his objection came out to something like \$850,000 that if  
18 he really feels that he's owed \$850,000 then he should file  
19 his own lawsuit. I mean he should opt out of this because  
20 there's no way that a class, a wage and hour class action is  
21 going to provide that kind of relief ever. It never has.

22 And others if they feel similarly won't participate  
23 or will object and then you'll have an opportunity to observe  
24 that at the -- in the final approval hearing.

25 THE COURT: Do you have a response to the request for

1 sharing the discovery that's already been provided?

2 MR. SCHWARTZ: I would defer to defendants on that.

3 THE COURT: I was going to say they have an interest  
4 that's different from yours but to the extent that it's a  
5 question for you and your clients is there any objection.

6 MR. SCHWARTZ: Only that we agreed as to some of it  
7 and not all of it necessarily but as to some of it we agreed  
8 that it was being exchanged for settlement purposes. We had  
9 initiated discovery and we decided to go into a mediation  
10 framework. We were given these documents in the context of  
11 settlement and so we agreed that we would keep them  
12 confidential, that they were being disclosed --

13 THE COURT: I understand. Look, to the extent --

14 MR. SCHWARTZ: I'm just honoring the agreement.  
15 That's all I'm saying.

16 THE COURT: Right. But to the extent there's  
17 information that your clients have provided I think there's no  
18 objection to sharing it with Mr. Yim, new counsel.

19 MR. SCHWARTZ: I don't have an objection. Mr. Yim  
20 frankly has all of it.

21 THE COURT: Well, that's the thing. He is a party  
22 and a named party to the litigation and discovery has been  
23 provided to him. So to the extent that Mr. Rand is successor  
24 counsel --

25 MR. SCHWARTZ: Yes, it's interesting. I'm not

1 sure -- when I -- that may be, Your Honor, but the -- when you  
2 asked us to brief that issue about the conflict and clearly  
3 the case law suggests that my obligation is to the class with  
4 the [inaudible] and Order case and the other cases that I  
5 cited I wonder how that plays in with the discovery that was  
6 produced that it was produced to me as counsel for this  
7 punitive class, not to Mr. Yim sort of in his individual  
8 capacity but as an agent of the representative class.

9 THE COURT: Some discovery certainly.

10 MR. RAND: Mr. Yim is still a representative of the  
11 class and is seeking to be a representative of the class.

12 THE COURT: He's seeking to be a representative of  
13 the class.

14 MR. RAND: There is no class yet. So everybody is  
15 seeking to be a representative of the class. It's the same as  
16 Mr. Schwartz's client. He's in exactly the same position.

17 THE COURT: But prior to the proposed settlement  
18 there had been significant discovery provided, no?

19 MR. RAND: Yes.

20 THE COURT: And it was provided to --

21 MR. SCHWARTZ: Well, it was provided -- so just to go  
22 back a moment. So we initiated discovery. We deposed the CEO  
23 and then we got into a mediation posture. This is my  
24 recollection.

25 THE COURT: Forgive me for interrupting. Just so I

1 can state what's already on the record.

2 At the initial planning conference we deferred the  
3 entry of a discovery schedule because you wanted to get  
4 started on settlement discussions and that was on May 25th.  
5 The settlement, at least in principle, a memorandum of  
6 understanding I believe was about a month later.

7 MR. SCHWARTZ: Yes, Your Honor.

8 THE COURT: I'm sorry. I interrupted you.

9 MR. SCHWARTZ: So the information that we were  
10 ultimately provided I think it was in the context of mediation  
11 because we had agreed to go to mediation and we went to  
12 mediation in March. So I think that the documents that were  
13 exchanged were in that context but again I would defer to  
14 defendants about how they feel about it.

15 MS. ESTEVEZ: From our perspective and, Your Honor,  
16 because this was not mentioned to us that there was going to  
17 be some request for discovery, I haven't gone back to sort of  
18 build out what actually started I believe in December of last  
19 year.

20 We did produce a significant amount of information  
21 and a lot of it being business information that gives  
22 financials. The CEO testified. This was from our perspective  
23 for the most part, and I'd have to refresh my memory about the  
24 beginning stages of it, was under 408. There are some things  
25 that we would --

1 THE COURT: Explicitly stated in agreement that was  
2 provided pursuant to 408.

3 MS. ESTEVEZ: Right. And I actually believe we might  
4 even have an agreement. If we don't -- I mean it's certainly  
5 in the mediation context. We agreed to mediate very early on  
6 neither of us believing that it would actually resolve because  
7 we were on opposite ends of the continuum, me thinking zero  
8 and Bryan thinking more.

9 So I would want a chance to actually look at that  
10 but I think very significantly we at least didn't find any  
11 cases out of the federal courts in New York that would allow  
12 an objector to come in at this stage and why that's so  
13 critical is because we have Mr. Yim who's saying he's owed  
14 eight or \$900,000 and [inaudible] believes that he's owed  
15 anything like that but he's coming in with that. If that's  
16 the case -- I mean he'd never even get \$400,000 out of this.  
17 To me those numbers are just crazy. So no matter what happens  
18 with this he is very likely to do exactly what he said in open  
19 court when he was here last time which is I want to opt out of  
20 this settlement. If that's true he has no standing to object.  
21 So the get he'd in front of not even knowing whether he's  
22 going to have standing to object, he's going to get notice  
23 just like everybody else and if he objects he absolutely as a  
24 matter of law has no standing to object.

25 So for me the craziness of putting another lawyer in

1 to invite people to go to some other lawyer that's going to  
2 redo discovery and second guess everything that's been done  
3 for somebody who has been in open court said that they were  
4 going to opt out of this settlement I mean for me this is all  
5 very premature.

6 Mr. Yim, there was some concerns expressed about  
7 getting the agreement that Mr. Yim would have because it was  
8 filed under seal. He will get that just like every other  
9 class member will get that with the notice. He'll have a long  
10 opportunity to consider whether he wants to participate,  
11 whether he wants to do nothing and have claims extinguished  
12 and be paid for that or whether he wants to opt out. I think  
13 when someone thinks they're owed \$900,000 and the maximum  
14 recovery is a fraction of that, the very likelihood that he is  
15 going to opt out and what I would ask is that the Court defer  
16 all that until he makes that decision 45 days after notice is  
17 sent.

18 THE COURT: Well, let me ask. I don't want to put  
19 you on the spot, Mr. Rand, but if you have an intention -- I  
20 just don't want to speculate about this but does your client  
21 plan to either opt out or object?

22 MR. RAND: I don't think there's a choice -- I don't  
23 think he has to make a choice because he's not an objector.  
24 He's actually a plaintiff in this action.

25 THE COURT: Yes, but he will either object to the

1 settlement or not.

2 MR. RAND: He'll object to the settlement and he'll  
3 say if it's approved he'll opt out. He's not an outside  
4 person. He's part of the case. I would request that that be  
5 provided to him.

6 THE COURT: What be provided to him?

7 MR. RAND: Everybody should be able to object and say  
8 if it hasn't changed then I'll opt out. That's only  
9 reasonable in this case where one of the plaintiffs who  
10 started the action.

11 THE COURT: I'm certainly not going to decide that.  
12 There's no reason to decide it now. If you choose to -- if  
13 preliminary approval is granted and notice is sent out and you  
14 choose to object obviously it's fair game for the others to  
15 say that you can't then opt out and vice versa. If you're  
16 going to opt out you can't --

17 MR. RAND: We will have standing to object because  
18 we're a party to the action. Maybe an objector --

19 THE COURT: Mr. Rand, Mr. Rand, I do understand the  
20 argument. I'm just not in a position to resolve it right now.

21 All right. I don't want to have my silence on -- in  
22 response to your statements be construed as anything. It's  
23 not. I don't mean to signal agreement that it's crazy to have  
24 another lawyer here. Mr. Yim is a named plaintiff.

25 MS. ESTEVEZ: No, I don't think -- I'm talking about

1 to send that out in a notice --

2 THE COURT: I see. You're talking about the notice.

3 MS. ESTEVEZ: -- where he doesn't have standing to  
4 object. I mean he's raised a whole bunch of things that are  
5 not in his briefing which -- I've been doing this for 23  
6 years. I've never heard of that because the process is  
7 there's a preliminary approval. It's a lesser standard than  
8 final approval. If somebody doesn't like the deal and it's  
9 very clear that Mr. Yim as he had said in open court is going  
10 to opt out if that's what is preliminarily approved and at  
11 that point he has no standing and you can't put the cart  
12 before the horse and have a whole bunch of class members in  
13 all coming in to try to renegotiate what they don't like about  
14 the agreement or they're going to opt out. That would make  
15 the process insane because a number of people could come in  
16 and try to tweak things. If they don't want to be part of the  
17 case they don't need to be part of the case. They're not  
18 bound by it in any way whatsoever and he can proceed to court.  
19 He could sever himself out of this and bring a single  
20 plaintiff action for \$900,000 if that's what he wants to do.

21 MR. RAND: Can I make some --

22 THE COURT: Of course.

23 MR. RAND: First, Mr. Yim has told me that he does  
24 not have all the documents that were produced in the case. He  
25 had represented that he had given all those documents to Mr.

1 Yim -- I don't know who's correct. My client said he does not  
2 have a disk with all the documents that were produced.

3 MR. SCHWARTZ: I didn't say that I gave him all the  
4 documents that were produced in the case. I never said that.  
5 He has the -- he was referring earlier to the independent  
6 contractor agreements including both the new one that Mr. Yim  
7 helped -- as one of the plaintiffs that was involved in  
8 mediation helped create and then also the old one that he is  
9 currently bound by. He certainly has those documents.

10 MR. RAND: The other thing I want to point out is  
11 that the Saline case deals with outside contractors. A major  
12 part of this case is the underlying New York breach of  
13 contract case. They're supposed to get commissions under  
14 their contracts. The documents I put forward show that they  
15 are falsifying what the invoices are to customers and rip off  
16 these poor drivers by 30 percent on their commissions. That  
17 has nothing to do with being an outside contractor. They have  
18 signed agreements. The agreement says they get their percent.  
19 They're being defrauded under the agreements. They should  
20 have their day in court and they should win and it can be  
21 proven by the documents in the case, some of which we've  
22 showed. We've showed the invoice to the customer and we've  
23 shown the statement of what commissions.

24 Actually just recently in 2015 they're continuing to  
25 do this activity. At a minimum someone needs to put forth all

1 the documents to show that Mr. Yim is -- that that's not a  
2 [inaudible] that's happening to him but there are many other  
3 situations where they show the invoice to the customer that  
4 show that his commission is being calculated properly. Here,  
5 in these papers knowing [inaudible] what the total amount  
6 sought in the case is. In securities class [inaudible] the  
7 law has now changed and you are required to put that in the  
8 notice. Now, I know it's not required in labor settlements  
9 but most labor settlements the court needs to know what the  
10 full amount sought in the case is to know if the amount  
11 recovered is reasonable. Here there's no statement as to the  
12 maximum amount estimated or alleged to be recovered in the  
13 case.

14 THE COURT: Do you want to respond?

15 MS. ESTEVEZ: I actually do because saying that our  
16 clients are ripping off people to customers. First of all,  
17 the documents that are attached, most of them say that they're  
18 estimates and we actually calculated the numbers under this  
19 and I think it's because he's -- the objector's counsel has  
20 not actually read the contract and doesn't understand the comp  
21 because all of the things he shows on these hand-helds  
22 actually show that this was paid correctly. And what he does  
23 is he'll show an invoice to a customer and it's mismatched  
24 with misinformation. That doesn't tell the full story. I  
25 think it was probably an issue that Mr. Yim had because I

1 explained some of this to opposing counsel walking through  
2 this but if you actually look at the documents submitted they  
3 all say that they're estimates or they're invoices and what  
4 happens with Carey and -- I actually tried to have a  
5 conversation with objector's counsel that this wasn't  
6 possible.

7           The amount that you charge to a customer -- I'm  
8 sorry, the amount of the fare that's charged to a customer is  
9 not the amount that the commission is based off of. It's very  
10 clear in the contracts. It's even more clear in the new  
11 contracts how that is done but if there are different  
12 surcharges or a travel agent actually brings that in it is  
13 very clear and completely lawful under the Pacto case, under  
14 the Pacto decision out of the Second Circuit, completely  
15 lawful to say and it's called a base vehicle revenue. It's  
16 not called -- and he wants commissions run off of that before  
17 you take out the 20 percent discount that you have to give to  
18 pay out to the travel agent. So the numbers are completely  
19 miscalculated. So I just want to say that we strongly  
20 disagree that the client was ripping off -- I mean that Carey  
21 was ripping off its drivers.

22           But nevertheless what this does show is that from my  
23 perspective is that Mr. Yim's claims are extraordinarily  
24 individualized if he's looking at his own documents and saying  
25 that he was ripped off and they gave explicit examples of a

1 whole list of them and here's where there was a problem. I  
2 mean that's a very individualized thing to Mr. Yim. I think  
3 as well as he's saying he's giving kickbacks to people. All  
4 of the things in here are all the reasons that he probably  
5 will opt out in which case he would not have standing to  
6 object.

7 THE COURT: Mr. Schwartz, do you want to be heard?

8 MR. SCHWARTZ: Yes, Your Honor. So a few things. On  
9 the various claims being asserted that the alleged contract  
10 violations, I mean one of the things that's important about  
11 the settlement is -- and one of the things we spent a lot of  
12 time negotiating was greater transparency in the new  
13 independent operator agreement on that exact point so it's  
14 much clearer. Unfortunately under the old contract the  
15 language is so, from my perspective tilted toward the company  
16 that they could -- it says there's a provision in here the  
17 adjusted gross revenue is equal to the verified gross charges  
18 less tips, sales and use tax. There's commissions, fees,  
19 system service charges, tools, parking expenses, telephone  
20 charges. It's a lot of stuff that the company can sort of  
21 interpret and make a lot of deductions.

22 It doesn't give a very strong basis for a contract  
23 claim but it does show -- it is one of the things that my  
24 clients were very concerned about which is why one of the  
25 major things we negotiated was a lot more transparency and a

1 provision that the company cannot add -- cannot take away from  
2 fares after the drivers agree. The driver knows --

3 THE COURT: After the driver?

4 MR. SCHWARTZ: Has agreed to -- so the driver agrees  
5 to run to the airport and pick somebody up. Before now,  
6 unlike before, if they take the new deal before they got out  
7 there they will know exactly what the deductions are going to  
8 be so what they're going to get paid which is different than  
9 before and much superior. If they're really independent  
10 contractors they're bargaining and they should know what the  
11 job is worth to them. That's one thing, Your Honor.

12 I do want to say though as far as the valuation of  
13 the claims issue, this idea that we didn't provide information  
14 on that I think a) we did and b) as Your Honor pointed out the  
15 case law does not support this idea that there's a set  
16 percentage of the overall claim value that is required in a  
17 class case -- in a class resolution. We cited in the papers  
18 the Morris decision where they got about two percent. We  
19 cited the Davis v. JP Morgan Chase case where the court  
20 explicitly held it's important to bear in mind it will often  
21 be difficult if not impossible to calculate with precision or  
22 accuracy what the best possible recovery would be at trial and  
23 that's why you don't have to say what -- exactly what that  
24 number is.

25 Nonetheless, we came to the conclusion that we were

1 covering a substantial and meaningful recovery, more than ten  
2 percent of what we thought a reasonable full relief of the  
3 total claims value is which frankly is an exceptional recovery  
4 even financially based on the Saline case sitting out there,  
5 based on other results where people are getting a much smaller  
6 fraction.

7 THE COURT: I just want to be sure I understood what  
8 you're saying when you refer to full recovery. Are you  
9 talking about assuming you were overpaid in all obstacles then  
10 by Saline and concerns about certifying a class in arbitration  
11 and actually got a verdict in your favor on all claims.  
12 You're saying that the damages you'd be able to prove would be  
13 about ten times the amount you're getting here or are you  
14 saying something else?

15 MR. SCHWARTZ: No, I think it came across that way.  
16 I think the full relief number again factoring in imprecisions  
17 like the Davis v. JP Morgan Chase acknowledges they're always  
18 present. It includes risk factors like the fact that if  
19 somebody signed a release and has an arbitration agreement and  
20 whatever that their overall likelihood of recovery is not 100  
21 percent or anywhere close to it. So the full relief number is  
22 if we -- it factors in that they -- and we will spell this out  
23 more at final approval but the risk factors are factored in to  
24 the full relief.

25 THE COURT: I guess I'm trying to understand. It

1 sounds like you're -- and I may be misunderstanding what  
2 you're saying but it's coming across as if you're factoring it  
3 in twice. Once as a basis for approval -- saying we should be  
4 allowed to have something that is less than full value but  
5 also in determining what full value would be you're baking  
6 into it concerns about arbitration and the like that would  
7 reduce it from a much higher number that would be if you were  
8 simply to prevail on all of your claims.

9 MR. SCHWARTZ: I think that to some degree that's  
10 true. I want to see where -- I know we talked about this.

11 THE COURT: I want to be clear. I think this is an  
12 issue that doesn't preclude preliminary approval and notice  
13 but it does have to be hashed out at the final approval stage.

14 MR. SCHWARTZ: I appreciate that, Your Honor. I  
15 think what this is making clear to me and I'm going to make a  
16 note of it is like I want to really spell this out more at the  
17 final approval.

18 MS. ESTEVEZ: Your Honor, one other thing to factor  
19 in and Bryan made this very clear to me in a lot of our  
20 discussions. The changing of this agreement was very  
21 significant. You're literally taking something that's been in  
22 place for many, many years and improving it significantly and  
23 it doesn't only just improve language and rights but I just --  
24 and you have this, Your Honor, and I refer you to what we've  
25 attached as -- called the Bill of Rights and right in there

1 you'll see ten things built in.

2 THE COURT: Yes, please give me a moment to find it.

3 MS. ESTEVEZ: Sure.

4 [Pause in proceedings.]

5 MS. LISITZKY: It's Document No. 57-2. So it's an  
6 attachment to the joint stipulation.

7 THE COURT: The proposed final order?

8 MS. ESTEVEZ: It's Exhibit F filed 9/25/15.

9 THE COURT: What page is it on, 107?

10 MS. ESTEVEZ: It's Page 77 of 107. That's the  
11 exhibit and then you can turn --

12 MS. LISITZKY: It's Exhibit F to the joint  
13 stipulation and settlement agreement which in turn is an  
14 attachment to the notice --

15 THE COURT: I don't know that I have that here. Do  
16 you have an extra copy that I can take a look at while you're  
17 discussing it?

18 [Pause in proceedings.]

19 MS. ESTEVEZ: Yes, Your Honor, I'll give that to you.

20 But this is effectively -- there's ten things listed  
21 here and we'll hand it up to you but these are the kinds of  
22 things that were -- these are actually just examples of things  
23 that were baked into the agreement. For example, that they're  
24 non exclusive -- they're not exclusive to Carey. They can  
25 work for others. They're allowed to hire employees. So some

1 of them, I believe including Mr. Yim, have had drivers from  
2 time to time basically do all their runs. They can turn down  
3 as much work as they want. They can take vacation for three  
4 months, six months, nine months. They can just not even show  
5 up the whole entire year and never take a job if they don't  
6 want to. They pick their own schedules. They decide their  
7 own method of operations. There's very, very little put on  
8 them and the value of that type of injunctive relief which is  
9 total and absolute freedom to do what you want, run your  
10 business like you want, delegate what you want, these are  
11 things that are all baked into this new agreement which had  
12 significant value and there's a whole host of cases, a lot of  
13 them coming out of securities which I'm sure objector's  
14 counsel is familiar with where that has a value as well.

15           Again, I'm sure that Mr. Schwartz will lay that out  
16 more at final approval but it is a very significant and  
17 material thing that actually the class members had a choice to  
18 take or not take and they can still collect what they want.  
19 As Mr. Schwartz had said, there are a number of people who  
20 when you enter a new agreement with Carey they generally get  
21 releases, releases that are valid under New York law, releases  
22 which we produced multiple examples of to Mr. Schwartz which  
23 would waive all of their New York claims. There are a lot of  
24 factors that had to go in here. I mean literally I think for  
25 15 hours one day we sat in our offices and I walked Bryan

1 through like how that would affect value. If this is a good  
2 agreement, if this is a good release and you can't do anything  
3 about it he can deduction claims all over the place under New  
4 York law. He can say six years under New York law but the  
5 bottom line is that that release is valid and I win and you  
6 can't show me a case that says I won't win, the value goes  
7 down significantly. So it was a number of factors like that  
8 that were taken into account where we finally -- I mean and a  
9 bit contentiously reached what we reached in terms of an  
10 agreement.

11 MR. RAND: On the valuing --

12 THE COURT: Wait, wait.

13 MR. RAND: I'm sorry, Your Honor.

14 THE COURT: I want to give Mr. Rand a chance but  
15 also just thank you for giving me the Bill of Rights. I had  
16 looked at that particular document before but they didn't  
17 summarize -- at least the salient portions of it are  
18 summarized in the, I believe in the memorandum supporting the  
19 preliminary approval.

20 Mr. Rand, I know you'd -- I'd like to start before I  
21 lose track of the question. Your client is dissatisfied with  
22 the amount of recovery. I get that and I understand the gap  
23 that you see between -- the very large gap between what he  
24 gets monetarily and what he thinks he's entitled to but I  
25 don't think you've addressed squarely what value if any your

1 client sees to the change in the contract.

2 MR. RAND: The change in the contract would require  
3 him -- he doesn't want to change the contract, first of all.  
4 He's happy with his contract. He has an unlimited contract.  
5 The new contract would require an arbitration provision which  
6 I don't know if you saw the article in the *New York Times*  
7 Sunday edition two weeks ago.

8 THE COURT: Well, I'm not going to decide anything  
9 based on [inaudible].

10 MR. RAND: I mean there's a long case law that  
11 says -- basically the article says when you have an  
12 arbitration agreement where you have to pay for the cost of  
13 arbitration you cannot challenge small damages that are done  
14 to you. And it's here --

15 THE COURT: I'm very familiar with the concerns about  
16 arbitration.

17 MR. RAND: Well, if Mr. Schwartz -- as Mr. Schwartz  
18 has admitted here, he says the people who have arbitration  
19 agreements have lesser value of their claims than people that  
20 don't. So now the people in this class are being forced to  
21 sign an arbitration agreement which will lower their ability  
22 that -- the value and merit of their future claims.

23 THE COURT: It lowers the value of claims that you  
24 might bring -- otherwise bring in court but I -- I guess one  
25 of the things that I would have to think about is does the

1 reformed contract provide a greater value --

2 MR. RAND: I'm sorry?

3 THE COURT: Does the reformed contract provide  
4 greater value and greater rights to drivers so that they  
5 wouldn't be in a position of having to bring claims and that  
6 they're better off if the contract is enforced?

7 MR. RAND: Most of the provisions in the Bill of  
8 Rights are designed to demonstrate that they're outside  
9 contractors so they can never make the argument again that  
10 they're not -- that they're [inaudible] employees and all  
11 those terms are the definitions needed to define someone as an  
12 outside contractor. There may be some benefits. I haven't  
13 studied it in detail and that's really what's going on there  
14 if you look at it on case value. Finally, the --

15 THE COURT: So wait. It's because -- because it  
16 makes clear that they are independent contractors that's a bad  
17 thing.

18 MR. RAND: Well, they only work for one company and  
19 they're only going to work for one company.

20 THE COURT: I'm talking about your client. Forget  
21 they.

22 MR. RAND: It's about them. They would like to be  
23 employed because they only work for one company. It's very  
24 hard to work for more companies. How many radios are you  
25 going to have in your car, you're going to get conflicting

1 signals. That's not how the business works and so my  
2 client --

3 THE COURT: How does Uber work?

4 MR. RAND: My client has been complaining that they  
5 won't be given enough work.

6 THE COURT: How does Uber work? Don't those drivers  
7 work for multiple services?

8 MS. ESTEVEZ: Including Carey.

9 MR. RAND: They work for Uber.

10 THE COURT: But don't they also take jobs for other  
11 companies?

12 MR. RAND: I don't think so.

13 THE COURT: That's contrary to my understanding but  
14 that's not --

15 MR. RAND: My client has not worked for other  
16 companies and he wants to work for this company as much as  
17 possible I believe. He was working 72 and a half hours.  
18 That's what he was doing for many years. I don't believe he  
19 was working for other companies.

20 Can I make one --

21 THE COURT: Yes, of course.

22 MR. RAND: The release in this proposed agreement is  
23 a blanket release that comes right up to the date of today  
24 with the date the agreement is signed and I don't see anything  
25 indicating where the calculation of damages is that ends on

1 the end date of the release because however they negotiate it,  
2 let's say it's all fair, right, and usually you have a  
3 spreadsheet and you say how much the people are owed, you say  
4 I'll take a 95 percent discount, this will be the settlement.  
5 But the release shouldn't release claims after the settlement  
6 calculation period ends. Since I don't know when their  
7 settlement calculations period ended and I see -- my client  
8 showed me that just recently he seems to be suffering damage.  
9 It seems to be reasonable if their calculations end at the end  
10 of 2014 the release should end at the end of 2014 so that  
11 [inaudible] the calculations covering the later period.

12 THE COURT: That strikes me as [inaudible]. This  
13 isn't the first settlement that I've seen and my experience  
14 and I may be wrong about this is that typically the release  
15 will go up to the date of the approval of the settlement and  
16 as a practical matter because you don't know when it's going  
17 to be you can't put the notice how -- exactly what the damages  
18 will be on that date. So this can't be the first time this  
19 has come up, can it?

20 MR. SCHWARTZ: Your Honor, it goes to preliminary  
21 approval and in my experience it always goes to either  
22 preliminary approval or final approval. I always negotiate  
23 for it to go to only preliminary approval.

24 THE COURT: Well, one or the other.

25 MR. SCHWARTZ: Yes. Your Honor, just to address a

1 few of those other things because there were a number of  
2 misstatements in there that are I think important to address.

3           It is simply not the case that most of the drivers  
4 a) want to be employees or b) only want to work for Carey.  
5 That is not a factual assertion. The drivers -- and I've had  
6 other driver cases where that was true so I know the  
7 difference. These drivers want to be their own business  
8 people but under the old contract they were restricted from  
9 doing so and prohibited from doing jobs for other -- they  
10 could be fired. They could lose their contract altogether if  
11 they did work for -- in fact, the contract that Mr. Yim has  
12 now he could be let go at any minute if he does work for other  
13 people.

14           THE COURT: But in fairness the theory under the  
15 complaint that you've been litigating or you're prepared to  
16 litigate if settlement isn't approved, is that the drivers are  
17 employees.

18           MR. SCHWARTZ: That they were being treated like  
19 employees -- that they had the worst of all worlds was our  
20 theory.

21           THE COURT: But that for purposes of the FLSA they're  
22 employees.

23           MR. SCHWARTZ: That they have been treated as  
24 employees because their agreement exercised control. That's  
25 not to suggest that they want to be employees. They don't

1 want to be restricted like employees. They want to be actual  
2 independent contractors and have that kind of independence.

3 THE COURT: But to the extent -- to the extent that  
4 in the absence of a settlement you would be litigating these  
5 claims your theory would be that they are entitled to the  
6 benefits and protections accorded under the FLSA to --

7 MR. SCHWARTZ: Looking back.

8 THE COURT: Yes, looking back to employees.

9 MR. SCHWARTZ: Right. But we're changing -- it's the  
10 difference -- the two -- we're talking about two different  
11 time periods. One is looking back and under Mr. Yim's old  
12 agreement on paper at least we felt we had a strong argument  
13 that the agreement made him seem like an employee because of  
14 the extent of the control under the Brock factors. But that  
15 going forward the agreement will make very clear that they  
16 really are genuinely, not nominally, not superficially, not to  
17 avoid liability but genuinely independent. They can turn down  
18 work. They can work for other companies. They can sell the  
19 business which is extremely valuable to them. I realize --  
20 this was something we negotiated we hard for that the company  
21 was not thrilled about.

22 But they can -- they're now going to have a ten-year  
23 contract that they can go sell and it's a valuable -- I won't  
24 say franchise. It's the wrong word but it's a valuable  
25 enterprise.

1 THE COURT: What is it exactly that he's selling?

2 MR. SCHWARTZ: They sell the IO agreement. They sell  
3 the agreement.

4 THE COURT: So, in other words, Driver A has an  
5 agreement, a ten year contract to provide services as an  
6 independent contractor to Carey and A can unilaterally sell  
7 that contract to B and B steps into the shoes of A.

8 MR. SCHWARTZ: Correct.

9 THE COURT: Okay.

10 MS. ESTEVEZ: Mr. Yim bought his contract.

11 MR. SCHWARTZ: I think all of my clients bought their  
12 contracts from other drivers originally.

13 Now, here's the big difference though. Under the  
14 old agreement Carey had unilateral approval or disapproval of  
15 a sale like they could just say no. They had a right of a  
16 first refusal and the old contract said you could not sell the  
17 franchise or whatever, the enterprise, for more than you  
18 bought it for which was a good argument for why they were  
19 employees because they couldn't profit or loss on it. Now  
20 they could sell it for any amount of money and it is valuable.

21 THE COURT: Is there any right of refusal or --

22 MR. SCHWARTZ: Only if somebody's not --

23 MS. ESTEVEZ: Not if you don't have a chauffeur's  
24 license or you're --

25 THE COURT: If somebody is qualified to hold a

1 position --

2 MR. SCHWARTZ: If somebody is qualified they cannot  
3 withhold it.

4 MS. ESTEVEZ: Right.

5 MR. SCHWARTZ: So it's a very big difference for  
6 them.

7 THE COURT: Is there -- other than reviewing  
8 qualifications is there any right of review?

9 MR. SCHWARTZ: I think it's for -- like if you had a  
10 criminal -- like if you had a drunk driving convictions.

11 THE COURT: Right. I guess what I'm trying to see is  
12 even if there's not a right of refusal or if there's not a  
13 veto other than for qualifications are there procedures built  
14 in that would give Carey the ability to essentially slow it  
15 down to a stop?

16 MR. SCHWARTZ: No, not the same -- they used to, yes.  
17 The old agreement clearly.

18 THE COURT: I'm talking about under the new  
19 agreement.

20 MR. SCHWARTZ: The new agreement is -- we could --  
21 anyway -- I haven't -- I wanted to make another point as well  
22 while we're trying to find that for you.

23 THE COURT: Mr. Rand, go ahead. Go ahead finish and  
24 then Mr. Rand.

25 MR. SCHWARTZ: Okay. So we'll address that point but

1 it's pretty nominal at this point. But another point that he  
2 makes though is about arbitration. Now I'm no big fan of  
3 arbitration generally speaking. But the biggest reason that  
4 I'm not a fan of arbitration is because of class waivers and  
5 they are going to be citing an arbitration provision. Carey's  
6 bearing all the costs of it. Here's the thing. Because the  
7 business model is changing so dramatically there aren't going  
8 to be class claims in -- it's almost impossible to conceive of  
9 a class claim that could arise under the new business system  
10 because they have so much freedom. So if somebody has a  
11 dispute where they say Carey took some money or whatever but  
12 it's not going to be a class issue the way that -- under the  
13 old contracts it could be because there were contract  
14 provisions.

15 THE COURT: Well, unless somebody in Mr. Yim's  
16 position for example who -- other than the fact that Mr. Yim  
17 wants the old contract but somebody who feels as Mr. Yim does  
18 who has the new contract might want to assert that despite  
19 your best efforts the drivers remained employees and would  
20 want to assert a new class and they would be precluded from  
21 doing so.

22 MR. SCHWARTZ: They would but -- and so that was  
23 certainly a compromise that when we were getting a lot of  
24 other benefits for the drivers we had to make some  
25 compromises. I would have loved to get more money.

1 THE COURT: So the argument essentially is that  
2 whatever the equals of compelled arbitration are you've  
3 ameliorated it by front loading relief that would obviate the  
4 later need to assert claims that wouldn't be able to go  
5 forward in court.

6 MR. SCHWARTZ: I think the advantages of the new  
7 agreement far, far outweigh it and the arbitration -- it's  
8 very difficult for me to imagine a situation where a class  
9 claim could arise under the new agreement. So that they're  
10 not really giving much up there.

11 THE COURT: Mr. Rand has been waiting patiently. Go  
12 ahead, sir.

13 MR. RAND: I just had one point that if someone was  
14 going to buy one of these contracts they would purely talk to  
15 the company and make sure the company was okay with them  
16 buying it. They would never buy it without ever talking to  
17 the company and if the company said they're were unhappy will  
18 you as a driver go buy a franchise. I actually did a case  
19 when I was working at a big firm as a pro bono attorney for  
20 again Idle Two Way radio and all these people had bought these  
21 contracts and they were diluted and there were too many  
22 contracts and they didn't get any money. So I think most  
23 people if they're paying real money are going to ask the  
24 company is this a good thing, are you happy with me. Now, the  
25 company will probably lie and say yes and screw them anyway

1 but they certainly wouldn't buy it if the company said they  
2 didn't like them.

3 THE COURT: Why do you say that?

4 MR. RAND: Huh?

5 THE COURT: Why do you say that the company would lie  
6 and screw them anyway?

7 MR. RAND: Because they're not lie and interfere but  
8 it's --

9 THE COURT: Look, you --

10 MR. RAND: I don't know. I'm just saying.

11 THE COURT: Whoa. Let me get the question out.  
12 You're positing a situation where the company in your words  
13 would lie and screw them anyway but --

14 MR. RAND: Because I'm saying it's about the --

15 THE COURT: I wish very much you would let me finish  
16 the question. If you're not willing to do that I won't ask it  
17 but that's fine.

18 MR. RAND: I apologize.

19 THE COURT: What is leading you to assume that  
20 somebody who comes to them who is otherwise unknown to Carey  
21 is going to be somebody that Carey has a motivation to treat  
22 poorly as opposed to bringing them on and having them replace  
23 the valued driver with somebody who's equally productive for  
24 them?

25 MR. RAND: Because right now the company has to

1 consent to a transfer. So therefore if the company doesn't  
2 like the driver they won't consent.

3 THE COURT: Yes, but why won't they like the driver?

4 MR. RAND: I don't know. I don't think they would.  
5 I don't think it's meaningful at all. I think it's not a  
6 meaningful part of the settlement but they're making this  
7 point.

8 THE COURT: Okay.

9 MR. RAND: And my point is that it doesn't really  
10 matter if they consent or don't consent if they have a right  
11 to consent or not consent because nobody would buy these  
12 without talking to the franchise and at least having the  
13 franchise tell them it's okay for you to buy it and we like  
14 you.

15 THE COURT: Anything else anybody wants to say?

16 MS. ESTEVEZ: Just, Your Honor, that in everything  
17 that he just said regarding Carey holding people up or  
18 screwing them or any of that is just false. Again, under the  
19 agreement the independent operator has the right to sell,  
20 lease or assign its rights under the agreement and what their  
21 obligation are is to make sure that the drivers have the very  
22 basic licenses, permits and qualifications to be a chauffeured  
23 driver. That's it.

24 And on top of that the other language that was  
25 negotiated is that any proposed ownership is going to be -- is

1 reported to the company and that the company shall approve of  
2 such change promptly and not withhold approval except on good  
3 cause shown and are based on the terms identified herein.

4           The other thing that the drivers have to do is agree  
5 to abide by the agreement that they're actually taking over.

6           One other thing that was raised is that I think --  
7 and I'd really love if Your Honor could get him to tell us  
8 where he got that more than half or half of the drivers do not  
9 have arbitration agreements. In fact, right before Mr.

10 Schwartz stepped into this case Carey self converted to  
11 several drivers for \$2,000 release of which is all factored  
12 in, these drivers to independent operating agreements which  
13 Mr. Schwartz came in and actually modified more in the ways  
14 that we've talked about and they all signed off because they  
15 do want to be independent operators.

16           Carey, and I'm representing as an officer of the  
17 Court, has multiple drivers that have more than one spot that  
18 have other people drive for them and that drive for other  
19 companies that own their own companies. In fact, I would say  
20 a large percentage of Carey actually have their own companies  
21 that they're actually chauffeured. Some of them have more  
22 than one car and again some of them have their own employees  
23 or their own contractors.

24           One other issue that he raised is that the cost of  
25 arbitration is a big problem for these people. Another thing

1 that was negotiated in this agreement is that the cost of  
2 arbitration for these independent operators will be no more  
3 than the cost of filing in court. Everything else is paid by  
4 Carey. So there is nothing that makes arbitration an obstacle  
5 here. Again, these are just misrepresentations that I'm not  
6 sure where they come from.

7 THE COURT: In terms of the number of drivers who  
8 are -- who have these arbitration clauses, I remember seeing  
9 the motion papers, the -- in support of the conditional  
10 settlement -- conditional approval rather. A number of --  
11 upwards of 200 members of the class.

12 MR. SCHWARTZ: It's a very high number.

13 MS. ESTEVEZ: It is the vast majority, Your Honor,  
14 and it --

15 THE COURT: Mr. Rand, where are you getting a  
16 different --

17 MS. ESTEVEZ: He said 100. He said 100.

18 MR. RAND: It's my recollection from reading the  
19 hundreds of pages in support of this preliminary approval and  
20 they put in numbers and that is my recollection. I was not  
21 quoting exact numbers.

22 THE COURT: Okay.

23 MR. RAND: But it could be in the papers. They say  
24 how many people were in the class and how many people have --

25 THE COURT: Well, they've given me that

1 representation in the memorandum in support of the declaration  
2 and I take it you're not saying it's false.

3 MR. SCHWARTZ: No.

4 THE COURT: All right.

5 MR. SCHWARTZ: I'm not saying it's true either. I  
6 just --

7 THE COURT: But you don't have a basis for saying  
8 it's false.

9 MR. SCHWARTZ: Correct.

10 THE COURT: Well -- all right. So to the extent that  
11 you are assuming that it's a higher number it seems to be  
12 speculation.

13 MS. ESTEVEZ: It's over 200, Your Honor.

14 THE COURT: Can you just give me the [inaudible] if  
15 you have that.

16 MS. LISITSKY: That is Page 19 on Document 57 and it  
17 cites to Bryan Schwartz's declaration.

18 MR. SCHWARTZ: We had all the -- Your Honor, this  
19 came from -- we had all the -- copies of all the agreements.  
20 So we knew how many people were in each bucket and how many --  
21 you know, all of the newer agreements that have been rolled  
22 out have arbitration clauses in them.

23 THE COURT: Well, taking into account everything I've  
24 read and the parties submissions and that I've heard today I'm  
25 going to recommend that the Court give preliminary approval to

1 the class. I think the requirements of numerosity and  
2 typicality and adequacy and predominance are all easily  
3 satisfied here and the settlement is based on my initial  
4 evaluation of the fairness is -- strikes me as within the  
5 range of possible approval and I would say no more than that  
6 pending litigation of final approval.

7           So I'm going to recommend to Judge Kuntz -- I should  
8 say because I raised this earlier that with respect to  
9 conflict I'm satisfied based on the submissions from counsel  
10 that for purposes of litigating these proposed settlement  
11 approval there's not [inaudible] conflict of interest and that  
12 the attorney's fees are properly best to consider in  
13 connection with final approval subject only to the fact that  
14 obviously the fee provision is part of post settlement and I  
15 need to say no more than that as well as the rest of the  
16 proposed settlement is within the range of permissible  
17 settlement agreements.

18           I don't find any problem with the proposed notice.  
19 So I'm going to recommend to Judge Kuntz that he give  
20 preliminary approval and approve sending out the notice  
21 without prejudice to the submission of a proposal by Mr. Yim's  
22 counsel for consideration of a supplemental notice that sets  
23 forth his views. I don't want to give any preview of how I  
24 might come out on that because I want to see the proposed  
25 notice and the parties arguments on whether or not it should

1 go out and I think the proposed notice as is is a self  
2 contained notice that can and properly should go out.

3 With respect to discovery, I'm not going to decide  
4 that now. I want you all to confer about that but if the only  
5 discovery that's been provided has been provided pursuant to  
6 Rule 408 I'm not sure that whoever has it could use it in any  
7 event in the approval process but I'm going to leave it to you  
8 guys in the first instance to work out whatever you can and if  
9 there's a dispute you'll bring it to me.

10 I'm going to consult with Judge Kuntz to see if he  
11 prefers something more formal in writing to document the  
12 reasons for my recommendations. If he doesn't think that's  
13 necessary I'm just going to enter a report and recommendation  
14 based on the transcript of today's proceeding.

15 Is there anything else for today, folks?

16 MR. SCHWARTZ: Your Honor, shall we set a date for a  
17 final approval hearing?

18 THE COURT: I don't -- no, only because I can't rant  
19 preliminary approval.

20 MR. SCHWARTZ: I understand.

21 THE COURT: And part of it is granting preliminary  
22 certification of the class, the settlement class and I can't  
23 do that. So it would really depend on Judge Kuntz accepting  
24 the recommendation.

25 MR. SCHWARTZ: Yes, I just didn't know if that was

1 part of the recommendation I guess.

2 THE COURT: Right. And of course since it is a  
3 recommendation -- right now the 14 day clock doesn't start to  
4 run because -- and it won't until I enter a report and  
5 recommendation on the docket. I'm going to defer doing that  
6 until I've spoken with Judge Kuntz to see if he prefers  
7 relying on the transcript of today's proceeding or he wants a  
8 written document. But once one of those are on docket then  
9 there will be a 14 day period in which anyone objecting to the  
10 recommendation can lodge those objections.

11 All right. Anything else for today, folks?

12 MR. RAND: Nothing.

13 MR. SCHWARTZ: No, Your Honor. Thank you.

14 THE COURT: Have a very good day.

15 (Proceedings concluded at 12:34 p.m.)

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

A handwritten signature in black ink, appearing to read 'Shari Riemer', is written above a horizontal line.

6 Shari Riemer, CET-805

7 Dated: December 9, 2015